

**IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA.**

O.S.A. No. 28 of 1998

Judgement reserved on: 26.12.2005

Date of decision : 4.1.2006

Bindra Devi Chauhan

..... Appellant.

Versus

State of H.P. and another

..... Respondents

Coram

The Hon'ble Mr. Justice : V.K. Jhanji, Judge.

The Hon'ble Mr. Justice : Surjit Singh, Judge.

Whether approved for reporting?

For the appellant:

**Mr. Bhupender Gupta, Sr. Advocate, with
Mr. Janesh Gupta, Advocate.**

For the respondents:

**Mr. M.S. Chandel, Advocate General, with
Mr. R.M. Bisht, Dy. A.G.**

Surjit Singh, Judge

Appellant Bindra Devi, hereinafter called plaintiff, is aggrieved by the judgment and decree, dated July 23, 1998, of the learned Single Judge of this Court, whereby her suit for damages, to the tune of rupees ten lacs, which she filed against the respondents State of H.P. and the Collector, hereinafter called as defendants, has been dismissed.

Whether reporters of Local Papers may be allowed to see the Judgment?

2. The cause of action, on which the claim of the plaintiff was based, may be summed up thus. The plaintiff had a house on two Biswas of area, bearing Khasra Nos. 1318 / 1221, situate in Notified Area Committee, Chopal. It was a three-storeyed house, having ten rooms. On one side of this house, at a lower level, there was a school play ground. The defendants, with a view to expanding the said school ground and developing it into a stadium, started excavation towards the house of the plaintiff. Bulldozers were pressed into service to do the excavation work. No precautionary measures were taken to protect the aforesaid house and the site under that house belonging to the plaintiff. While doing the excavation work, no retaining walls were erected. On account of the deployment of the bulldozers for excavation and cutting work, the entire hillock, on which the house of the plaintiff stood, was rendered unstable. This resulted in the sagging and collapse of the house of the plaintiff in July, 1993. Excavation was carried in June, 1993. The value of the house of the plaintiff was about rupees five lacs. The plaintiff alleged that a sum of rupees seven lacs was required to re-construct the house. Further, it was claimed that after the collapse of the house, she had to hire some accommodation for her residence. She further alleged that she had some tenants in the building, who vacated it after the damage was caused to it and thus she sustained loss of rental income also. She claimed a sum of rupees ten lacs for the damage to the house, for loss of rental income, for payment of rent of the accommodation, which she hired and for mental torture, which she allegedly suffered due to the damage to the house.

3. Defendants alleged that the suit was not maintainable in the form in which it had been laid and was also bad for non-joinder of necessary parties. It was denied that reckless or indiscriminate excavation was done

or that the cause of damage to the building was such excavation. Instead it was alleged that heavy rains had taken place from 9th July to 11th July, 1993 in Chopal area and because of that not only the plaintiff's house but certain other houses had also collapsed or got damaged.

4. Following issues were framed, on the pleadings of the parties:-

1. Whether the suit in the present form is not maintainable? OPP
2. Whether the suit is bad for non-joinder of necessary parties? OPD
3. Whether the plaintiff suffered any damage on account of the negligence on the part of the defendants, as alleged? OPP
4. If issue No. 3 is proved in affirmative, whether the plaintiff is entitled for any damages, if so, to what amount? OPP.
5. Relief.

5. At the end of the trial, the learned Single Judge held that the plaintiff had failed to prove that her house was damaged due to any act of negligence on the part of the defendants and consequently dismissed the suit. Issues No. 1 and 2 were, however, found against the defendants, because they did not press the same at the time of final hearing.

6. Grievance of the plaintiff is that the learned Single Judge has not properly scrutinized the evidence on record and that this has led to the wrong finding qua issue No. 3. It is alleged that the evidence on record conclusively proves that the house got damaged and ultimately collapsed, necessitating its re-construction due to reckless and indiscriminate excavation, carried out by the defendants on the lower side of the site of the house.

7. We have heard the learned counsel for the plaintiff as also the learned Advocate General for the defendants. We have also looked into the entire evidence on record. We find ourselves in dis-agreement with the learned Single Judge with regard to his finding that the plaintiff has failed to prove that the cause of the damage to the house was any act of negligence on the part of the defendants, while excavating the site for expansion of school play ground, so as to develop it into a stadium.

8. The plaintiff examined nine witnesses, including herself, to prove the plea that reckless and indiscriminate cutting and excavation was done below her house by the defendants while expanding the school ground with a view to developing it into a stadium. In her own deposition she stated that cutting of the hill was done about twenty to twenty-five feet deep towards her house, by means of bulldozers, thereby destabilizing the site of the house of the plaintiff and other area between the edge of the hill and the site of the house. She has stated that no **Dangas** were raised to protect the hillock on that side, which got exposed due to excavation.

9. PW-2 Ajay Kumar Gupta, an Engineer by profession, who was engaged by the plaintiff to assess the damage, has stated that the damage was caused to the house of the plaintiff due to indiscriminate cutting of the hill-side, which was carried out quite deeper.

10. PW-3 Shahi Ram has stated that cutting of the hill towards the house of the plaintiff was done indiscriminately and no **Dangas** were raised and because of that the house of the plaintiff collapsed.

11. PW-6 a photographer, whose services were hired for taking the photographs of the damaged house, has proved the photographs, which are Exts. PW-2/1 to PW-2/26.

12. PW-8 Roop Singh, Field Kanungo and PW-9 Mohi Ram, Patwari, who visited the spot soon after the damage to the house took place, have proved their report Ext. PW-8/A, per which the cause of the damage to the house was indiscriminate cutting and excavation of the hill towards the house of the plaintiff.

13. Suggestions were put to the witnesses of the plaintiff, including the plaintiff herself, that the house got damaged due to unprecedented rains, which occurred in July, 1993. All the witnesses, though admitted that heavy rains had taken place in July, 1993, yet they denied that the cause of the damage to the house was such rains. They stated that in Chopal area rainfall is quite heavy almost every year.

14. The defendants examined three witnesses to controvert the plaintiff's evidence. They are DW-2 Sunil Sharma, Executive Engineer, DW-3 Mast Ram, Assistant Engineer and DW-4 Bimal Kumar Sharma. All these witnesses had supervised the work of development of the stadium. Though all of them stated that the cause of the collapse of the house was the heavy rains, they did not deny in the cross-examination that bulldozers were deployed to do the cutting, that cutting was carried out quite deep towards the house of the plaintiff and that no Dangas were raised. It has come in the evidence of these witnesses that the level of the site, on which the house of the plaintiff stood, was about six meters higher than the level of the stadium and that the distance between the edge of the hillock, of which cutting had been carried out and the house of the plaintiff was about twenty to twenty-five feet. When the height was about six meters or say about twenty feet and the distance between the edge of the hillock and the site of the house also remained twenty to twenty-five feet after the excavation, which was carried out by bulldozers, which process must have destabilized

the strata of the hillock, it was all the more essential for the defendants to have constructed breast-walls along the cut side of the hillock to protect it against sliding. Admittedly, no breast-wall was raised.

15. Taking into account the above referred to evidence, we have absolutely no doubt in our mind that the defendants did the cutting and excavation work of the hill towards the house of the plaintiff, in a reckless and indiscriminate manner and that was the main cause of the damage to the house.

16. Now, coming to the question of quantum of compensation, the plaintiff herself proved by examining the Kanungo and the Patwari a report, which was prepared by them soon after the damage to the house was caused. The report is Ext. PW-8/A. A perusal of this report shows that the house was double-storeyed, having 837 square feet covered area on each of the two floors and the total value of the structure was Rs.1,25,000/-.

17. The house, according to the plaintiff, was constructed about seven years before it was damaged. That means it was constructed sometime in the year 1987. PW-2 Ajay Kumar Gupta, the Engineer engaged by the plaintiff for assessing the damage to the house, has stated that he worked out the value of the house on the basis of the schedule of rates of 1987. At the same time he has stated that he increased the value by 68% on account of premium, i.e. cost index on the rates. Now when there was a schedule of rates issued in the year 1987 itself and the house was also constructed in the year 1987, the increase on account of cost index was not justified. According to the abstract of cost, the total cost of the house was Rs.3,25,573/- (exclusive of the addition on account of cost index at the rate of 68%). The witness has worked out the cost of the damaged house in accordance with the market value of the entire building material. As a

matter of fact, wood which is the main material, utilized in the construction of houses in the hills, particularly in rural area, is provided by the Government at nominal rates. Standing trees are allotted to the residents of the area at a rate ranging from Rs.20 to Rs.50 per tree depending upon its girth. Similarly, stone is also available locally in abundance. Admittedly the structure was made of stones, wood and mud. Therefore, the valuation done by PW-2 Ajay Kumar Gupta, cannot be taken to be the correct valuation. In fact the valuation done by the Patwari and the Kanungo, i.e. PW-8 Roop Singh and PW-9 Mohi Ram, on whose testimony and report Ext. PW-8/A, the plaintiff places as much reliance as on the testimony and report of PW-2 Ajay Kumar Gupta, appears to be correct one. Consequently it is held that the value of the house, in question, was Rs.1,25,000/-.

18. The plaintiff has claimed damages on the basis of the cost of re-construction of the house. That in our considered view is not permissible. It has come in the testimony of PW-2 Ajay Kumar Gupta that the plaintiff shall have to construct a breast-wall for the protection of her house and a sum of Rs.1,75,000/- would be required on the construction of this work. The figure appears to be on the higher side, because as already noticed, raw material for the construction of breast-wall, i.e. stones, are locally available. The total site, on which the house stood, is just two Biswas or say about eighty square yards. It is not believable that for the protection of such a small site by means of construction of a breast-wall and that too only on one side, a sum of Rs.1,75,000/- would be required. In our view, a sum of Rs.50,000/- would be sufficient for the construction of such a wall.

19. As a result of the above discussion, we hold that the plaintiff is entitled to compensation to the tune of Rs.1,25,000/- on account of damage to the house and Rs.50,000/- on account of the expenses required to be incurred for the protection of the site by raising a breast-wall. We further hold her entitled to a sum of Rs.25,000/- on account of hardship suffered and agony undergone by her on account of the damage to the house, which necessitated shifting of her residence to some rented accommodation. It may not be out of place to notice that the plaintiff has already re-constructed her house, which suggests that she may not have spent too much of money on payment of rent. There is no evidence in support of her claim that she has suffered any loss of rental income. Hence, nothing is awarded on this count. Thus, the total amount, to which she is entitled, comes to rupees two lacs.

22. As an upshot to the above discussion, the appeal is accepted, the judgment and decree under appeal are set aside and a decree for a sum of rupees two lacs, with proportionate costs and interest at the rate of 6% per annum pendente lite and from the date of passing of the decree to the date of payment of the aforesaid amount, is passed in favour of the plaintiff and against the defendants. Decree sheet be drawn accordingly.

(Surjit Singh), J.

(V.K. Jhanji), J.

January 4, 2006, (BC)

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JUDGMENT FOR CONSIDERATION, PLEASE.

(Surjit Singh), J.

I agree / do not agree.

(V.K. Jhanji), J.

List for pronouncement of judgment on _____

(Surjit Singh), J.

Court Secretary